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Supreme Court of the United States

OCTOBER TERM, 1962

No. 623

WILLIAM RICKENBACKER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Your petitioner, William Rickenbacker, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on October 29, 1962. That judgment affirmed a judgment of the United States District Court for the Southern District of New York convicting petitioner of a violation of 13 U. S. C. § 221(a), penalizing refusals to answer questions on a census schedule.

Opinions Below

The opinions of the United States District Court for the Southern District of New York (LEVET, *J.*), are set forth at pages 4a-6a (sustaining the indictment) and 73a-79a (on the merits) of the Appendix to petitioner's brief in the Court of Appeals. They are not reported.

The opinion of the Court of Appeals, not yet reported, is made a part of the appendix to this petition.

Jurisdiction

The jurisdiction of this Court is provided by § 1254(1) of Title 28 of the United States Code.

The jurisdiction of the District Court was provided by § 3231 of Title 18 of the United States Code.

Questions Presented

1. Did the use of coercion to require petitioner and 16,000,000 others to answer the intimate questions about their homes set forth in the Housing Questionnaire of 1960 violate the Fourth Amendment?

2. Did the singling out for prosecution of this petitioner from the perhaps hundreds of thousands who refused to answer this questionnaire, because he had written a critical magazine article, violate the First Amendment?

3. Does the statute, penalizing one who refuses to answer questions about "himself" and his "family," apply to this petitioner who refused to "fill out" a questionnaire asking questions about his house and the "extra persons" in the house?

4. Was there a failure of proof in that there was no showing that the census-taker at any time put to petitioner orally any question in the questionnaire?

Constitutional and Statutory Provisions

First Amendment:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *"

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated * * *"

13 USC § 221(a):

> "(a) Whoever, being over eighteen years of age, refuses or wilfully neglects, when requested by the Secretary or by any other authorized officer or employee of the Department of Commerce or bureau or agency thereof acting under the instructions of the Secretary or authorized officer, to answer, to the best of his knowledge, any of the questions on any schedule submitted to him in connection with any census or survey provided for by subchapters I, II, IV, and V of chapter 5 of this title, applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant, shall be fined not more than $100 or imprisoned not more than sixty days, or both." (Act of August 28, 1957, 71 Stat. 485)

Statement of the Case

This prosecution arises out of the United States Census of 1960.

In 1960 the Bureau of the Census, in addition to the "enumeration" authorized by Article 1, Section 2 of the Constitution, submitted to "every fourth household * * * a sample household form" (8a).

This form is GX1 (50a). It asks numerous, detailed questions concerning the construction and equipment of the householder's dwelling. Among these questions are: "How many bedrooms are in your house or apartment?" "Do you have an electric or gas clothes dryer?" "How many bathrooms are in your house or apartment?" "Is this house connected to a public sewer?"

Also included in the housing questionnaire was a so-called "extra person questionnaire" (50a). This latter asked the householder many detailed intimate questions about all other people in his household, such as income (wages, tips, profits,

seven specified other sources), marital life (marriages, children), education (highest grade at school, college), service in Armed Forces, etc.

"Sometime in May, 1960" Mrs. Margaret Riolo, a Bureau employee, left this form at petitioner's home in Briarcliff Manor, New York (11a). This form is frequently referred to as the "blue form."

Later, in a telephone conversation, petitioner told Mrs. Riolo that he "hadn't [sent in the form], and he didn't intend to" (12a).

There was no evidence that Mrs. Riolo put any question to petitioner orally.

Petitioner had received the questionnaire. He felt it to be an unwarranted and unconstitutional invasion of the privacy of the citizen, a view which he expressed in an article entitled "The Fourth House", published in the May 21, 1960 issue of the magazine *National Review* (DXD, 64a-71a).

In this article petitioner characterized the "blue form" as "unconscionably long, uncivilly inquisitorial and absolutely unconstitutional" (64a). The reference was to the Fourth Amendment, quoted in full in the article (64a). Petitioner attacked the census as useless, meddlesome, bureaucratic and otherwise objectionable.

On December 19, 1960 petitioner was called before the Grand Jury. On that occasion, he assented to a statement put to him by the Assistant United States Attorney that "you and/or your wife notified the census enumerator that the form had not yet been completed and finally that it would not be completed" (GX2, 53a).

Thereupon the Assistant United States Attorney proceeded to ask petitioner most of the questions from the blue form questionnaire. Petitioner answered them responsively (DXA, 54a-61a).

This was the only time any Government officer or employee orally asked petitioner any of the questions on the questionnaire, as distinguished from asking him to "fill out" or "complete" the questionnaire.

At the trial petitioner introduced expert and other evidence that statistically valid data respecting the subject matter of the household questionnaire could have been obtained without questioning every fourth household, that is to say, some 16,000,000 people, and without the power of compulsion. This evidence is discussed *infra* pages 6-7.

The petitioner also introduced evidence that the motive for the prosecution against him was retaliation for his magazine article. This evidence is discussed *infra* page 9.

Reasons for the Writ

Essentially the reasons for granting the writ are that the first three questions involve decisions on federal questions in a way in conflict with applicable decisions of this Court; the fourth question involves sanctioning a departure from the accepted and usual course of judicial proceedings by a lower court. We take up these questions seriatim.

1. The use of coercion to require petitioner and 16,000,000 other people to answer the intimate questions about their home set forth in the Housing Questionnaire of 1960 violates the Fourth Amendment.

> "* * * [C]onstitutional provisions for the security of the person and property should be liberally construed. A close and literal construction deprives them of half their efficacy * * *" *Boyd* v. *United States*, 116 U. S. 616, 635.

A "too sweeping" order for the production of papers, *Hale* v. *Henkel*, 201 U. S. 43, 76, or a demand "out of proportion to the end sought," *McMann* v. *Securities and Exchange Commission*, 87 F. 2d 377, 379 (C. A. 2d), violate the Fourth Amendment.

> "The basic premise of the prohibition against searches was * * * the common law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization." *District of Columbia* v. *Little*, 178 F. 2d 13, 16-17 (C. A. D. C.).

We would be prepared to argue that to compel the production of a paper giving a detailed (1) inventory of the victim's house and (2) report of the intimate affairs of the people in the house *per se* violated the Fourth Amendment. However, in this case it is not necessary to go so far as it is abundantly clear that whatever information the Government sought could have been obtained without coercion and without questioning 16,000,000 householders; further, that the record affirmatively shows that there was no connection between the inquisition of this petitioner and the purpose of the housing census. The census was therefore "too sweeping" and "out of proportion to the end sought."

A highly qualified expert in the field of private surveys (15a-16a) testified that a statistically valid nationwide survey respecting household equipment and characteristics could be made by 500 to 5,000 interviews with an appropriately selected cross-section of the population (18a) and without coercion (22a).

The Bureau of the Census itself takes the unemployment survey—a survey of great importance which receives close attention from the highest Government officials, labor leaders and economists—by only 35,000 interviews (DXC1, 62a) and without coercion (63a).

The Bureau also takes its current population characteristics survey on 35,000 interviews (DXB).

No connection was shown between the questionnaire submitted to this petitioner and the stated purpose of the census. Thus Mr. Robert N. Burgess, Director of the Bureau of the Census at the time this census was taken, testified that its purpose was as follows (44a):

> "You see, the Housing Administration gives Government aid in certain cities for improving the housing conditions."

This petitioner lives at 507 Hardscrabble Road, Briarcliff Manor, New York.

The "connective reasoning"* between the questions addressed to him and this subject is by no means apparent and no effort was made to show it.

Thus, the record shows no necessity whatever for the search and invasion of petitioner's privacy.

2. The singling out of this petitioner for prosecution from the perhaps hundreds of thousands of people who refused to answer this questionnaire, because he had written a critical magazine article, violates the First Amendment.

The discussion of this question by the Court of Appeals wholly fails to mention the central fact relied on by petitioner, namely, that this prosecution punished petitioner for the publication by him of a magazine article severely criticizing the housing census (DXD, 64a-71a).

We readily concede the proposition that a defendant cannot escape punishment merely by showing that somebody else committed the same crime and was not prosecuted. This is all that is ruled by *Grell* v. *United States*, 112 F. 2d 861 (C.A. 8th) and *United States* v. *Manno*, 118 F. Supp. 511 (N.D. Ill.).

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* *Watkins* v. *United States*, 354 U. S. 178, 215.

On the other hand, a discrimination in law enforcement which is "purposeful" and results in an "unequal application (of the law) to those who are entitled to be treated alike" is invalid. *Snowden* v. *Hughes*, 321 U. S. 1.

The classic statement of the doctrine is in *Yick Wo* v. *Hopkins*, 118 U. S. 356. There it appeared that a statute was enforced against Chinese laundrymen but not against others. The Supreme Court granted a writ of habeas corpus to release a laundryman so convicted, saying at pages 373-374:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Yick Wo has been repeatedly cited to this day. This Court's most extensive review of the principle in recent years was in *Snowden* v. *Hughes*, mentioned above.

An otherwise valid statute can not be enforced so as to impair freedom of speech. *Labor Board* v. *Virginia Electric Power Co.*, 314 U. S. 469; cf. *Thomas* v. *Collins*, 323 U. S. 516, 537-538.

Obviously a prosecution intended to retaliate for an exercise of freedom of speech against one of thousands, perhaps hundreds of thousands, who had similarly violated the statute would fall within the condemnation of *Yick Wo*.

The evidence in this case establishes beyond doubt that such was the motivation of this prosecution, especially if recognition is given to the principle stated by Lord Mansfield that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted". (*Blatch* v. *Archer*, Cowp. 66.)

Preliminarily, it should be remarked that the Government with an unbefitting lack of candor inconsistent with the spirit of *Jencks* v. *United States*, 353 U. S. 657, has wholly failed to provide the exact facts. The case illustrates the handicap which the criminal defendant suffers by reason of the unavailability of discovery procedures comparable to those applicable to civil cases.

The evidence does establish that this is the only prosecution for refusal to answer the housing questionnaire known to Mr. Burgess, Director of the Census Bureau until March, 1961, long after the census was concluded (42a); that Mr. Burgess learned of petitioner's refusal from the magazine article (39a); that he passed on the reference to the General Counsel of the Department of Commerce of any request to initiate legal action (41a); that this case was brought to the attention of the United States Attorney for the Southern District of New York by a letter from the General Counsel of the Department of Commerce enclosing the magazine article and concluding: "I do not believe that Mr. Rickenbacker should be permitted to violate the law *in this manner*." (DXF, 71-72a.)

Mr. Burgess asserted that the number of refusals to answer the questionnaire was "*what we call small*" (36a), an expression he failed to elucidate. Although the census-taker (12a) and the local supervisor (9a) referred to reports of refusals contemporaneously made, the Bureau claimed in response to a subpoena duces tecum that there were no such reports (33a).

The private survey expert testified that in such surveys taken by him the number of refusals varied from five to ten per cent (22a), which would mean 800,000 to 1,600,000. The Census Bureau monthly unemployment survey states that the number of refusals is sufficiently substantial to require adjustment (DXC2, 63a).

Petitioner submits that it is relevant to refer to the following language from *United States* v. *Rumely*, 345 U. S. 41, 44:

> "• • • • Mr. Chief Justice Taft admonishes in a famous passage, Child Labor Tax Case, 259 U. S. 20, 37, that [the Court should not be so 'blind' as] not [to] see what '[a]ll others can see and understand.'"

3. 13 USC § 221(a), penalizing one who refuses to answer questions about "himself" and his "family" does not apply to this petitioner who refused to answer questions about his house and the "extra persons" in the house.

The crucial language is the statute limits the penal provisions to questions "applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant."

A person's self simply is not his bedroom, his bathroom, his clothes dryer, his TV set or his house's connection with a public sewer.

If all questions about a man's possessions and relations apply to "himself," why specify those to which the criminal penalties relate? Surely questions about a man's family or the "farm of which he is the occupant" apply just as much to "himself" as those about the house in which he lives?

The Census Bureau in the very questionnaire at issue says (50a):

> "You will see questions *about your dwelling* are on the next page and that questions *concerning yourself and each other person in your household* are on the following pages."

Thus the Census Bureau itself, which presumably well knows the reaction of the ordinary citizen to questionnaires,

draws the same distinction between "dwelling" and "self" as does petitioner.

The Court of Appeals justified the application of the statute because some of the questions related to petitioner's "family."

But it is an "*extra person* questionnaire" (50a; lower right hand corner of sheet 3). Other people living in a house are not necessarily members of the family, nor do members of one's family necessarily live in this house.

Watkins v. *United States*, 354 U. S. 178, establishes that a question is entitled to know the subject with "undisputable clarity" (page 214) and that an overlap between the indicated subject and the true subject does not suffice. If the Government proposed to ask questions about petitioner's family it should have said so.

Although both the Court of Appeals and the questionnaire refer to questions about "self" they are not identified. Petitioner is unable to do so. Certainly there appear to be no such questions unless "self" be defined to include highly remote meanings.

Watkins by implication surely holds, further, that when a group of unauthorized questions are woven in with proper questions the proper questions cannot be isolated for purposes of a criminal conviction (page 215).

Moreover, criminal statutes will be strictly construed, *United States* v. *Resnick*, 299 U. S. 207, 209, and statutes involving searches of doubtful validity will be similarly construed. *Federal Trade Commission* v. *American Tobacco*, 264 U. S. 298.

4. There was a failure of proof in that the Government failed to show that any question was ever put to petitioner orally or that he refused to answer orally.

It seems obvious and was conceded in the Court of Appeals that §221(a) refers to oral questions and answers. Yet the Government failed to show that any question was ever put to petitioner orally by the census-taker or that he refused to answer orally when invited to do so. On the other hand, defendant showed that the only time questions were put to him orally he answered them (55a-61a).

What the Government did show was that petitioner had said "he wasn't going to fill out the form" (12a) and had failed to "fill out such a form" (29a) ("form" referring to the Household Questionnaire).

The opinion of the Court of Appeals, as petitioner reads it, puts upon a defendant the burden of showing that he did answer orally. Petitioner submits that such a ruling is a "departure from the accepted usual course of judicial proceedings." Surely the burden of proof in a criminal prosecution is on the Government.

Wherefore petitioner respectfully prays that a writ of certiorari issue under the seal of this Court to review the judgment herein of the United States Court of Appeals for the Second Circuit and to reverse said judgment.

November 28, 1962

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Counsel of Record for Petitioner.

APPENDIX

Opinion of the Court of Appeals

UNITED STATE COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—October Term, 1962

(Argued October 17, 1962 Decided October 29, 1962)

Docket No. 27618

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM F. RICKENBACKER,

Appellant.

Before:

WATERMAN, HAYS and MARSHALL, *Circuit Judges.*

Appeal from a judgment of conviction entered by the United States District Court for the Southern District of New York, Levet, *J.*, for refusing to answer a census schedule in violation of 13 U. S. C. A. § 221 (a). Affirmed.

SHELDON H. ELSEN, Asst. United States Attorney (Vincent L. Broderick, United States Attorney for the Southern District of New York, on the brief), (Arthur I. Rosett and Michael F. Armstrong, Asst. United State Attorneys, of counsel), *for Appellee.*

C. DICKERMAN WILLIAMS, New York, N. Y., *for Appellant.*

MARSHALL, *Circuit Judge*:

William F. Rickenbacker was convicted in the United States District Court for the Southern District of New York, after a one-day trial before Judge Levet sitting without a jury, for refusing to answer a schedule entitled "Household Questionnaire for the 1960 Census of Population and Housing," in violation of 13 U. S. C. A. § 221(a). Judge Levet imposed a suspended sentence of 60 days' imprisonment, fined the defendant $100, and placed him on probation for one day. Rickenbacker has appealed the conviction on several grounds. We find all of these grounds without merit and affirm.

Early in 1960, in connection with the administration of the decennial census, the Government sent a supplementary household questionnaire to every fourth household in the United States, including Rickenbacker's household in Briarcliff Manor, New York. Rickenbacker subsequently told a census enumerator that he did not intend to answer the questionnaire. He later told the Grand Jury that indicted him that he based his refusal to answer upon a belief that the questionnaire represented "an unnecessary invasion of my privacy" and upon a desire "to maintain liberties in this country as a constitutional philosophical question." He also stated that he did not rest his refusal upon any fear of self-incrimination. The indictment, trial, and conviction followed.

Appellant makes several arguments on appeal. He contends that the penal sanctions for refusal to answer census questions embodied in 13 U. S. C. A. § 221(a) may be applied only to a person who refuses to answer questions "applying to himself or to the family to which he belongs or is related," construed in a narrow, strict sense; and that Congress did not intend the statute to be applied to a person who refuses to answer questions relating to the contents, con-

struction, and conveniences of the house or household in which he lives. This question of statutory construction we do not reach, because it is clear that many of the questions on the household questionnaire which appellant refused to answer were immediately related to himself or to his family, even under the strict construction of the statute which he here advocates.

Appellant further argues that 13 U. S. C. A. § 221 "in its present form does not require written answers." However, during the time that the census was being taken appellant did not answer the questionnaire either orally or in writing. We also find no merit in appellant's claim that the household questionnaire violated his right under the Fourth Amendment to be free from illegal searches and seizures. The authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively. *United States* v. *Moriarity*, 106 Fed. 886, 891-92 (C. C. S. D. N. Y. 1901). Cf. *United States* v. *Sharrow*, — F. 2d — (2 Cir. 1962). The questions contained in the household questionnaire related to important federal concerns, such as housing, labor, and health, and were not unduly broad or sweeping in their scope. The fact that some public opinion research experts might regard the size of the household questionnaire "sample" as larger than necessary to obtain an accurate result does not support a conclusion that the census was arbitrary or in violation of the Fourth Amendment. See 13 U. S. C. § 195.

Finally, appellant contends that his conviction is invalid under the rule of *Yick Wo* v. *Hopkins*, 118 U. S. 356, because the motivation of the Government's decision to prosecute him was discriminatory. He bases this contention on the claim that although there is indication that other persons have also refused to fill out the household form, he is the only one against whom the Government has initiated

a criminal prosecution. This claim falls well short of proving the *Yick Wo* requirement that a statute has been "applied and administered by public authority with an evil eye and unequal hand." 118 U. S. at 373-74. "The fact that not all criminals are prosecuted is no valid defense to the one prosecuted." *United States* v. *Manno*, 118 F. Supp. 511, 515 (N. D. Ill. 1954); *Grell* v. *United States*, 112 F. 2d 861, 875 (8 Cir. 1940).

Appellant's other claims are without merit.

Affirmed.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of October, one thousand nine hundred and sixty-two.

Present:

HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM RICKENBACKER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.